No. 85-720

Supreme Court, U.S.
FILED
DEC 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

CLEAR PINE MOULDINGS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney

National Labor Relations Board
Washington, D.C.20570

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether, in awarding backpay to make employees whole for an employer's failure to reinstate them on a timely basis following an unfair labor practice strike, the Board properly held that the employer failed to meet its burden of proving a willful loss of earnings as to employees who were available to testify concerning their efforts to find interim employment but whom the employer chose not to call to testify.

2. Whether, in the circumstances of this case, the court of appeals should have remanded for reconsideration, instead of enforcing, the Board's award of backpay to employees whose efforts to mitigate their losses pending reinstatement consisted only of registering at a state unemployment office.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statutory provisions involved 1

Statement 2

Argument 6

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Alfred M. Lewis, Inc. v. *NLRB*, 681 F.2d 1154 7

Florence Printing Co. v. *NLRB*, 376 F.2d 216, cert. denied, 389 U.S. 840 7

Nickey Chevrolet Sales, Inc., 195 N.L.R.B. 395, enforced, 475 F.2d 1395 9

NLRB v. *Brown & Root, Inc.*, 311 F.2d 447 7

NLRB v. *Dodson's Market, Inc.*, 553 F.2d 617 7

NLRB v. *J.G. Boswell Co.*, 136 F.2d 585 7

NLRB v. *Madison Courier, Inc.*, 472 F.2d 1307 8

NLRB v. *Mastro Plastics Corp.*, 354 F.2d 170, cert. denied, 384 U.S. 972 ..... 7, 8

NLRB v. *Miami Coca-Cola Bottling Co.*, 360 F.2d 569 7

Page

Cases—Continued:

NLRB v. *Mooney Aircraft, Inc.*, 366 F.2d 809 7

NLRB v. *Rice Lake Creamery Co.*, 365 F.2d 888 ..... 7, 8

Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 ..... 7, 9

Top Manufacturing Co., 254 N.L.R.B. 976 9

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 1

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-720

CLEAR PINE MOULDINGS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is not reported. The decision and order of the National Labor Relations Board (Pet. App. 10a-50a), including the decision of the administrative law judge (Pet. App. 51a-146a), are reported at 268 N.L.R.B. 1044.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1985. A petition for rehearing was denied on July 10, 1985 (Pet. App. 147a-148a). The petition for a writ of certiorari was filed on October 8, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 3-4.

STATEMENT

1. Petitioner is a wood products manufacturer in Oregon. The Board found that petitioner committed numerous unfair labor practices by coercively interrogating and threatening employees, by discriminatorily disciplining an employee due to her union activities, by refusing to bargain in good faith and by making unilateral changes in certain terms and conditions of employment. The Board further found that petitioner's unfair labor practices had caused its employees to engage in a strike and that the employees were unfair labor practice strikers. The Board's order required petitioner to offer reinstatement to the unfair labor practice strikers and to make them whole for any losses caused by petitioner's failure to reinstate them in a timely manner after the strike.[1] The court of appeals enforced that order on July 25, 1980, and this Court denied certiorari. 632 F.2d 721 (9th Cir.), cert. denied, 451 U.S. 984 (1981).

2. Petitioner offered to reinstate the unfair labor practice strikers on November 25, 1977, "conditioned on the availability of suitable employment" (Pet. App. 56a). The strikers offered to return to work on November 28, 1977, but due to a shortage of openings at the time most were not reinstated until sometime during the period extending from December 31, 1977 to March 31, 1978 (GCX 1, at 1-13).[2] The Board and petitioner were unable to agree on the amount of backpay owed to strikers who were not immediately reinstated, and the Board began supplemental backpay proceedings to determine the amounts due. The Board's Regional Director issued a backpay specification setting forth the amount of

---

[1]The Board's unfair labor practice findings and order are reported at 238 N.L.R.B. 69 (1978).

[2]"GCX" refers to the General Counsel's exhibits in the supplemental backpay proceeding. "Tr." refers to the transcript of the hearing in that proceeding.

backpay alleged to be owed and also the known interim earnings of each employee. Petitioner filed a general answer denying that any backpay was due under the Board's order. Subsequently, petitioner filed amended answers in which it contended that it owed no backpay because the union allegedly had waived the strikers' rights to reinstatement; alternatively, petitioner contested the specific amounts due a number of individual employees. Pet. App. 67a-71a; GCX 1.

At the hearing held to resolve the issues raised by the backpay specification, petitioner for the first time raised the defense that certain employees had incurred a willful loss of earnings by failing to seek interim employment (Tr. 145-146, 345-346). Accordingly, petitioner introduced evidence to show that jobs were available at companies in the area when the strike ended (Pet. App. 119a-127a). In addition, petitioner called 14 employees to testify at the hearing (testifying employees), each of whom stated that he had made no effort to find interim employment but had only applied for unemployment compensation. Twenty-two other employees covered by the backpay specification (uncalled employees), although available to testify, were not called by either petitioner or the General Counsel, and petitioner made no specific claim at the hearing that those employees had failed to seek interim work.

Following the hearing, an administrative law judge (ALJ) issued a decision awarding backpay (Pet. App. 51a-146a). The ALJ rejected petitioner's contention that the union had waived the strikers' rights to reinstatement and also rejected its claim that the employees had willfully lost earnings by failing to seek interim employment. With respect to the latter contention, the ALJ found that, although petitioner had permissibly conditioned reinstatement "on the availability of suitable employment" (*id.* at 56a), without indicating when jobs might be available, the

strikers as a class could have entertained "a reasonable belief that reinstatement could occur any day" (*id.* at 140a) and therefore had no obligation to seek interim employment. He found further (*id.* at 140a-141a) that the evidence of employment conditions at other plants in the area did "not establish jobs readily available to these claimants." Accordingly, it was unnecessary for the ALJ to make findings with respect to the sufficiency of the mitigation efforts of individual employees. The ALJ awarded backpay to the 14 testifying employees and also to the 22 uncalled employees.[3]

In exceptions to the ALJ's decision filed with the Board, petitioner contended for the first time that the uncalled employees should also be denied backpay, arguing that the General Counsel had failed to meet his burden of showing that all employees covered by the backpay specification had not willfully lost earnings. The Board rejected petitioner's contentions and, in all respects relevant here, upheld the ALJ's award of backpay to the uncalled and the testifying employees (Pet. App. 10a-50a).[4]

---

[3]Five other employees covered by the backpay specification could not be located and thus neither their interim earnings nor their desire to return to work for petitioner could be verified. As to those employees, the ALJ, in accordance with Board policy, ordered that their backpay be held in escrow for a period of one year while efforts to verify their status were made, after which time the sums would either be disbursed or returned to petitioner (Pet. App. 144a n.20).

The ALJ also ordered backpay for six other employees who testified at the hearing that they did seek interim employment, and made adjustments to or eliminated the amounts specified for certain other employees. The ALJ's determinations concerning those employees are not in issue here.

[4]The Board, in findings not at issue here, found that two employees awarded backpay by the ALJ were disqualified due to strike misconduct and that another employee was disqualified because he had lawfully been discharged prior to the strike (Pet. App. 10a-50a).

3. Petitioner sought review of the Board's supplemental backpay decision in the court of appeals. On July 27, 1984, the Board filed a motion with the court seeking remand "to reconsider certain issues raised regarding the amounts of backpay due under the Board's order" (Pet. App. 149a-151a). The court denied the motion and instructed the Board to file a brief.

The Board's brief (at 8) repeated the request that the case be remanded because it had erred in adopting the ALJ's conclusion that the 14 testifying employees (who merely registered at the unemployment office) were "excused from the normal obligation to mitigate damages by seeking employment in the interim." The Board stated (*id.* at 8, 11) that it had "overlooked Board authority" holding that employees presented with a reinstatement offer indefinite as to the time of rehire are obliged to seek work in the interim and that generally "registration at a government employment office alone, is insufficient to establish reasonable diligence." The Board stated further (*id.* at 8) that, "although * * * backpay claimants 'need not instantly seek new work' " and are entitled to a brief grace period, the Board had never approved a grace period of the duration involved here. "As a consequence of * * * having overlooked prior case law indicating that employees having only an indefinite offer of reinstatement must mitigate by seeking interim employment, neither the administrative law judge nor the Board made findings concerning the sufficiency of each individual employee's efforts to seek interim employment" (*id.* at 8-9). Accordingly, the Board requested a remand so that it could make the necessary findings and correct its error in awarding backpay to the testifying employees.

The Board argued also (*id.* at 12-13) that, in the event the court denied its request for a remand, the court should deny enforcement with respect to the 14 testifying employees but

should grant enforcement as to the uncalled employees. Concerning the latter group, the Board argued that (*ibid.*) "[petitioner] clearly did not meet its burden of proving willful loss of earnings."

4. The court of appeals denied the Board's request for a remand and enforced the backpay order in full (Pet. App. 1a-9a). The court stated (*id.* at 5a) that "[t]he record as developed is sufficient for a backpay determination and the Board's decision adequately resolved the issues presented to it." On the merits, the court concluded (*ibid.*) that petitioner "has not carried its burden of proving that any of the * * * employees failed to exercise reasonable diligence in looking for interim work during the backpay period." In upholding the award of backpay to the uncalled employees, the court ruled (*id.* at 7a) that "[i]t is the employer who carries the burden of producing evidence and the testimony of * * * employees" in support of a willful loss of earnings defense. In addition, the court found "sufficient evidence to support the Board's decision to award backpay to those employees who testified that their efforts were limited to registering at [a] state agency" (*id.* at 6a). The court relied on the fact that "employees were returning to work rapidly and each of them could have reasonably expected to be back at Clear Pine on short notice," and also relied on prior Board decisions that, in the court's view, allowed employees a grace period "roughly equal in duration to the period here" (*id.* at 6a-7a). The court concluded that the "employees did not need to make, under the circumstances, a more diligent search for work" (*id.* at 7a).

ARGUMENT

1. Petitioner concedes (Pet. 31) "that the defense of willful loss of earnings is an affirmative defense, and that the burdens of pleading and persuasion rest on the employer." Petitioner nonetheless contends (Pet. 30-37) that once an employer raises that defense the burden is on the General

Counsel to produce testimony from each employee showing that he did not fail to seek interim employment. That contention is without merit and does not warrant this Court's review.

It is well-settled that a claim of willful loss of earnings through failure to seek interim employment "must be put in issue by [the employer] and is in no sense a part of the Board's case." *NLRB* v. *J.G. Boswell Co.*, 136 F.2d 585, 597 (9th Cir. 1943) (citing *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 199-200 (1941)). "[I]t is not practical, and it would significantly hamper the backpay remedy, if each discriminatee were required to prove the propriety of his efforts during the entire backpay period." *NLRB* v. *Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966). Accordingly, courts have uniformly placed the burden on the employer to produce the particular witnesses needed to establish this defense.[5]

Petitioner sought to meet its burden in this case by calling approximately 20 employees to testify about their efforts to find interim employment. Petitioner, however, chose not to call an additional group of available employees. Having failed to carry the burden of its defense as to those employees, petitioner cannot now escape backpay liability by contending that the burden of producing employee testimony was instead on the General Counsel. See *Florence Printing Co.* v. *NLRB*, 376 F.2d 216, 223 (4th Cir.), cert. denied, 389 U.S. 840 (1967).[6]

---

[5]See, *e.g.*, *Florence Printing Co.* v. *NLRB*, 376 F.2d 216, 221-223 (4th Cir.), cert. denied, 389 U.S. 840 (1967); *NLRB* v. *Mooney Aircraft, Inc.*, 366 F.2d 809, 812-814 (5th Cir. 1966); *NLRB* v. *Brown & Root, Inc.*, 311 F.2d 447, 454-455 (8th Cir. 1963); *Alfred M. Lewis, Inc.* v. *NLRB*, 681 F.2d 1154, 1156 (9th Cir. 1982); *NLRB* v. *Dodson's Market, Inc.*, 553 F.2d 617, 619 (9th Cir. 1977).

[6]Petitioner's reliance (Pet. 32-33) on the decisions in *NLRB* v. *Mastro Plastics Corp.*, 354 F.2d 170 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966) and *NLRB* v. *Rice Lake Creamery Co.*, 365 F.2d 888 (D.C.

2. Petitioner also contends (Pet. 19-30) that the award of backpay to the 14 testifying employees is contrary to prior Board and court decisions. Although the Board believes that the court of appeals should have remanded the case to

---

Cir. 1966) is misplaced. In both cases the Board ordered that backpay for employees who had been unavailable to testify at the initial backpay hearing (either because they were in jail or could not be located) be placed in escrow in order " 'to afford the [employer] a reasonable opportunity to examine these claimants' " (*Mastro Plastics*, 354 F.2d at 175; see *Rice Lake Creamery*, 365 F.2d at 891). The Board, however, subsequently made the backpay awards final without giving the employers such an opportunity. The court held that under those circumstances the Board was obliged to produce the employees for examination by the employer before awarding backpay.

Here, in a manner consistent with those cases, the Board placed into escrow the backpay of five claimants who were unavailable and provided that the sums not be paid until petitioner has an opportunity to inquire as to their interim earnings and mitigation efforts (see page 4 note 3, *supra*). Nothing in either *Mastro Plastics* or *Rice Lake Creamery* requires the Board, against the great weight of authority (see note 5, *supra*) to offer the testimony of employees who are themselves available to an employer pursuing a mitigation defense.

Moreover, in both *Mastro Plastics* and *Rice Lake Creamery* the employers raised the willful loss of earnings defense in their pleadings, and had made clear prior to the backpay decision their intention to elicit testimony from the employees at issue. Here, in contrast, petitioner failed to raise the defense in either its initial or amended answers, stated at the hearing only that it was raising the defense as to an indeterminate number of employees (Tr. 145-146), and then proceeded to call only 20 employees to testify. It was only after the ALJ's decision awarding backpay that petitioner announced for the first time its desire to have testimony from employees it chose not to call.

Finally, there is no merit to petitioner's suggestion (Pet. 34-36) that its evidence of favorable employment conditions in the surrounding area required the General Counsel to produce each claimant to explain his failure to obtain an interim job. The Board, upheld by the court of appeals, correctly concluded that such evidence failed to meet the employer's burden of proving a defense of willful idleness on the "particular facts concerning each separate individual" as to whom the defense was raised. *NLRB* v. *Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972).

the Board for reconsideration of the mitigation issue as to these employees, we submit that, in the circumstances of this case, the issue does not warrant this Court's review.

The court of appeals did not take issue with the well-settled principles that backpay will not be awarded "for losses * * * willfully incurred" (*Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197-198 (1941)), and that generally an employee awaiting reinstatement must attempt to mitigate his losses by seeking interim employment. Although the Board now believes that the "grace periods" permitted here, which range from five weeks to more than three months, are excessive and not the equivalent of those sanctioned by the cases relied on by the court of appeals,[7] the issue turns on the application of a settled principle to the facts of this particular case. Such a fact-bound issue does not warrant review by this Court.

---

[7]See *Nickey Chevrolet Sales, Inc.*, 195 N.L.R.B. 395, 398 (1972), enforced, 475 F.2d 1395 (3d Cir. 1973); *Top Manufacturing Co.*, 254 N.L.R.B. 976, 979 (1981). In *Nickey Chevrolet*, the Board awarded backpay to an employee who received no valid offer of reinstatement for 18 months and who had waited for about six weeks from the date of his discharge before seeking interim work, where the evidence showed that the employee had registered for unemployment benefits within a week after his discharge and reported to the claims office every week until his benefits were exhausted. In *Top Manufacturing*, the Board held that an employee who, pursuant to his duty to mitigate, had sought and obtained an interim job that was due to start in three weeks was not obliged to seek still other interim work for that three-week period.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney

National Labor Relations Board

JANUARY 1986

DOJ-1986-01